valid, enforceable interest in property even if they are not "owners." That does not mean, however, that mineral rights are so "scarce" that government may infringe on the constitutional rights of lessees. As some commentators have noted, the "public property" argument generally has been used simply as another way of articulating the scarcity argument, the notion being that because frequencies are scarce their use had to be licensed, and the licensing power was tantamount to public ownership of public property.[45/]

Today, when broadcast television licenses are no longer allocated by the Commission but instead are traded on the open market, there is nothing unique about broadcast spectrum that distinguishes it from other economic goods. The Commission cannot, therefore, continue to apply a lower level of First Amendment scrutiny to broadcasters based on the concept of spectrum scarcity.

E. Courts and Commentators Have Questioned the Validity of the Scarcity Doctrine.

When the Commission conducts its review of the validity of the spectrum scarcity rationale it must also consider the criticism levied against it. Numerous jurists and commentators have, in fact, questioned the rationale of spectrum scarcity. For example, shortly after the Supreme Court invited a review of the scarcity rationale, the D.C. Circuit in a decision written by Judge Bork said flatly that "[t]here is nothing uniquely scarce about the broadcast

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45/ Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899 (forthcoming Spring 1998) (manuscript at 912) ("*Robinson*").

spectrum."[46] Because "[a]ll economic goods are scarce," the D.C. Circuit Court questioned how the concept of scarcity can be used to justify industry-specific regulations.[47]

Other jurists have questioned the scarcity doctrine. In 1995, in a strongly worded dissent to a decision upholding the channeling of indecent programming, Judge Edwards concluded:

> In my view, it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast [licensees] based on an indefensible notion of spectrum scarcity. It is time to revisit this rationale.[48]

Judge Edwards noted the "proliferation" of broadcast stations and observed that, "should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum."[49]

Judge Edwards was joined two years later in his criticism of the scarcity rationale by Judge Williams, Judge Silberman, Judge Ginsburg, and Judge Sentelle.[50] In their dissent from a D.C. Circuit *per curiam* decision that denied a petition for rehearing of the decision upholding the 1992 Cable Act's requirement that direct broadcast satellite ("DBS") providers set aside several channels for noncommercial programming of an educational or informational nature, Judges Edwards, Williams, Silberman, Ginsburg and Sentelle questioned the validity of the *Red*

46/ *TRAC v. FCC*, 801 F.2d at 508-9 n.4. The case involved whether the FCC should apply three forms of political broadcast regulation to teletext.

47/ *Id.* at 508.

48/ *Action for Children's Television*, 58 F.3d at 675 (Edwards, dissenting).

49/ *Id.*

50/ The Joint Parties note that Judge Edwards, Judge Williams, Judge Silberman, Judge Ginsburg, and Judge Sentelle still sit on the D.C. Circuit.

Lion decision.[51/] While they noted that, as an intermediate court of appeals, they could not "announce the death" of *Red Lion*, they believed it sufficiently feeble such that it should not be extended to the DBS medium.[52/]

Legal commentators have been no less critical of the scarcity rationale. Former FCC Commissioner and now law professor Glen Robinson observes that "[w]hatever credibility the scarcity rationale may once have enjoyed, it no longer enjoys it. Today, the scarcity argument for broadcast regulation is widely scorned. . . ."[53/] Professor Laurence H. Winer, in a 1998 paper for The Media Institute, similarly notes, "[w]hatever the case in past decades, isn't broadcast scarcity now dead as a viable concept for regulation, as some members of the Commission have already suggested?"[54/] Professor Rodney A. Smolla, also in a 1998 paper for The Media Institute, repeated what has become a common refrain: "[s]carcity no longer exists."[55/] As far back as 1982, commentators, including the then-sitting Chairman of the FCC, disputed the scarcity rationale.[56/]

51/ *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723 (D.C. Cir. 1997).

52/ *Id.* at 724 n.2

53/ *Robinson,* manuscript at 909.

54/ Laurence H. Winer, The Media Institute, Public Interest Obligations and First Principles, Issues in Broadcasting and the Public Interest at 5 (1998).

55/ Rodney A. Smolla, The Media Institute, Free Air Time for Candidates and the First Amendment, Issues in Broadcasting and the Public Interest at 5 (1998).

56/ In a 1982 Texas Law Review article, FCC Chairman Mark S. Fowler and his legal assistant Daniel L. Brenner set forth the defects of the scarcity rationale. *See* Mark S. Fowler and Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221 (1982) ("*Fowler & Brenner*").

Indeed, the FCC already has found the scarcity doctrine no longer valid as a rationale to restrict the First Amendment rights of broadcasters, as Commissioners Powell and Furchtgott-Roth have noted.[57/] In 1987 the Commission reviewed the scarcity doctrine in response to a D.C. Circuit remand where the constitutionality of the "fairness doctrine" was at issue.[58/] The Commission found that there was no longer any scarcity in the number of broadcast outlets available to the public in geographic markets, and analyzed the concept of physical or allocational spectrum scarcity.[59/]

In looking at allocational scarcity the Commission noted that it had relied, for the most part, on an initial licensing scheme based on administrative hearings. The FCC correctly noted that, once it made its initial license decision, market forces took over. In fact, the Commission determined that approximately 71% of radio stations and 54% of television stations had been acquired not through the Commission's licensing of a new allotment but in the open market.[60/] The Commission found that, after initial licensing, "the only relevant barrier to acquiring a broadcast station is not governmental, but — like the acquisition of a newspaper — is

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57/ Powell/ Furchtgott-Roth Statement at 12.

58/ *See Syracuse Peace Council*, Memorandum Opinion and Order, 2 FCC Rcd 5043 (1987).

59/ *Id.* at 5054-55.

60/ *Id.* at 5055. If the Commission updates these figures of the number of licenses still in original licensee hands, the Joint Parties believe the Commission will find that an even smaller number of licenses have been allocated by other than economic market forces. Because it would be instructive, the Commission should update these figures as part of its biennial review examination of allocational scarcity.

economic."[61/] Finding, as Judge Bork had in *TRAC v. FCC*, that all economic goods are ultimately scarce, the FCC agreed with Judge Bork that the concept of scarcity is irrelevant to an evaluation of First Amendment standards and proceeded to apply the same standards to broadcasters that applied to other media.

While some may wish to repudiate or ignore the findings of earlier Commissions, the fact remains that the Commission in a published decision concluded that the doctrine of spectrum scarcity does not support lesser First Amendment rights for broadcasters. Given that *Syracuse Peace Council* is a valid Commission decision, it remains entitled to no lesser measure of full faith and credit than decisions of the current and any subsequent Commission. The current Commission cannot, therefore, ignore the issue of scarcity during this biennial review.

F. Diminished Broadcaster First Amendment Protection Is Not Supported by Spectrum Scarcity.

Courts, commentators, and the Commission itself, including a prior Commissioner as well as two sitting Commissioners, have recognized that it is time to put the spectrum scarcity rationale to rest. While some may argue that broadcast regulation may be justifiable under other rationales, such as the statutory "public interest" standard, there should be no confusion about the fundamental issue in this proceeding. The statutory "public interest" standard has no bearing on the legal foundation for the daily newspaper/broadcast cross ownership restriction because the concept of spectrum scarcity alone was the basis for its constitutionality.[62/]

61/ *Syracuse Peace Council*, 2 FCC Rcd at 5055.

62/ The Joint Commenters do not quarrel with the necessity to license broadcast station operation: as the early days of broadcasting confirmed, technical interference among stations on the same or adjacent frequencies required an orderly enforcement of technical compliance rules.

(continued...)

Further, it is no defense of scarcity to note that companies spend "millions of dollars" to acquire existing broadcast licenses. The acquisition of stations only confirms that spectrum is not so scarce as to be unavailable. Thus, the concern is not that spectrum is unavailable but, rather, that certain persons or groups do not have access to "millions of dollars." This is not a problem with spectrum scarcity; it is a problem with capital markets.[63/] Under this theory, if broadcast spectrum is scarce, so then is every other medium of expression that cannot be obtained for free. Not everyone can afford to publish a newspaper or magazine or make a feature film, yet these mediums of expression enjoy full First Amendment protection, thus showing that economic scarcity, standing alone, does not form a constitutional basis for regulating speech. The Supreme Court "has never suggested that the dependence of a communication on the expenditure of money operates itself to reduce the exacting scrutiny required by the First Amendment."[64/]

Similarly, the Commission's interest in "diversity" is insufficient to support the continuation of the daily newspaper/broadcast cross ownership restriction absent spectrum scarcity. Merely saying that "51 voices are better than 50," as the Commission did when it adopted the restriction, is insufficient if the rationale for the rule no longer can be factually supported. Indeed, such a statement is a tautology unless there is proven underlying scarcity.

62/ (...continued)
The permissibility of government regulation to avoid technical interference, however, does nothing to demonstrate spectrum scarcity.

63/ *Fowler & Brenner* at 225 n. 83 ("The limiting factor in broadcasting is the same as in print: economic support.").

64/ *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

Because the Supreme Court's decision upholding the daily newspaper/broadcast cross-ownership restriction is inextricably linked to the "physical limitations of the broadcast spectrum," generalized discussions of the public benefits of diversity are inapplicable to the fundamental issue that first must be analyzed. Whether elimination of the newspaper/broadcast cross-ownership restriction would affect the Commission's "twin goals of promoting diversity and economic competition"[65/] is not where the analysis begins. If the Commission intends to retain the daily newspaper/broadcast restriction, it first must make an affirmative finding that the factual premise for the doctrine of spectrum scarcity remains valid. If the Commission is unable to do so, it must repeal the daily newspaper/broadcast cross-ownership rule.

II. EQUAL PROTECTION CONSIDERATIONS ALSO DEMAND THAT THE DAILY NEWSPAPER/BROADCAST CROSS-OWNERSHIP RESTRICTION BE ABOLISHED.

The equal protection clause of the Constitution is a second constitutional basis that requires elimination of the daily newspaper/broadcast cross-ownership restriction. The equal protection clause requires a rational basis for the differing treatment of substantially similar groups.[66/] Because there is no rational basis on which broadcasters can be singled out from among the many players in the media industry and denied the opportunity to own in-market newspapers, the daily newspaper/broadcast cross-ownership restriction cannot stand.

65/ *Notice* at ¶28.

66/ *See, e.g., Police Department of the City of Chicago v. Mosley,* 408 U.S. 92 (1972).

A. Video Providers Other than Broadcasters Are Not Limited in Their Ability to Own In-Market Newspapers.

Television broadcasters at one time were the only providers of video programming. Consumers today, in contrast, receive video information and entertainment programming from numerous other sources.[67] Indeed, in its *Notice of Inquiry* on the current status of competition in the video services market, the Commission requests comment on the extent to which broadcasters compete with cable and other video services providers.[68]

Broadcasters no longer are the sole or even the dominant provider of video programming, yet broadcasters alone are singled out by the FCC's rules as ineligible to own an in-market newspaper. Other well established players in the video services market, such as cable, DBS and telephone operators, can own in-market newspapers.[69] Because there is no rational basis for treating broadcasters differently from these other video providers, the daily newspaper/broadcast cross-ownership restriction must fall.

67/ The extent of current competition is shown by the fact that, during the week of June 22, basic cable for the first time captured a higher market share than did the broadcast networks. John M. Higgins, *Hooked-Up — Basic cable booming,* BROADCASTING & CABLE, July 6, 1998, at 41.

68/ *See In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* Notice of Inquiry, CS Docket No. 98-102, FCC 98-137 (released June 26, 1998) at ¶ 7.

69/ In fact, the Commission affirmatively decided against imposing a daily newspaper/cable operator cross-ownership restriction. *In the Matter of Amendment of Part 76 of the Commission's Rules and Regulations Relative to Diversification of Control of Community Antenna Television Systems; and Inquiry with Respect Thereto to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals,* First Report, 52 FCC 2d 170 (1975).

As Commissioner Powell has said, "[i]t is just fantastic to maintain that the First Amendment changes as you click through the channels on your television set."[70/] The time has come to recognize that broadcast channels are indistinguishable from cable, DBS or other channels on the television dial. Broadcast television stations are viewed by the public no differently from other video channels, yet broadcast television station licensees are singled out as uniquely unable to own an in-market newspaper. If this restriction ever made sense in the simpler era of yesterday, it is nonsense today.

Equal protection demands similar treatment for substantially similar groups unless there is a rational basis for doing otherwise. There is no rational basis to restrict broadcasters from owning in-market newspapers when other media entities are not similarly restricted. Similarly, newspaper owners are uniquely disadvantaged by being unable to own an in-market broadcast station. Under the equal protection clause, the daily newspaper/broadcast cross-ownership restriction must be abolished.

B. Many Broadcast Ownership Restrictions Have Been Relaxed or Repealed Since 1978.

When the U.S. Supreme Court looked at the equal protection issue in 1978, it found that the daily newspaper/broadcast cross ownership restriction "treat[s] newspaper owners in essentially the same fashion as other owners of the major media of mass communications . . . under the Commission's multiple-ownership rules."[71/] Finding that owners of radio stations and

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70/ Commissioner Michael K. Powell, "The Public Interest Standard: A New Regulator's Search for Enlightenment," Address before the American Bar Association 17th Annual Legal Forum on Communications Law (April 5, 1998) at 8.

71/ *National Citizens Comm. for Broad.*, 436 U.S. at 801.

television stations were similarly limited in their ability to acquire additional in-market broadcast outlets, the Court denied newspaper owners' equal protection claims.

Since the Court's decision, however, ownership rules have been loosened considerably. Today, newspapers and broadcast station owners are virtually alone among major information providers in facing an absolute barrier to common ownership. Indeed, in the past few years, Congress and the Commission have eliminated or substantially relaxed many ownership limitations. Radio ownership limitations have changed from allowing the common ownership of only a single AM and a single FM radio station in the same market to the current regulatory regime in which, depending on the number of voices in a market, as many as eight radio stations may be commonly owned.[72/] National limits on radio ownership have been eliminated.[73/] Congress eliminated the twelve television station national ownership limit and raised the national audience reach limit from 25 percent to 35 percent of television households.[74/] Finally, Congress repealed the statutory ban on local television/cable system cross-ownership, leaving the Commission free to consider elimination of that rule.[75/] All of these deregulatory actions were precipitated in large part by a universal awareness that radio and television broadcasters

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72/ *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) at 202(b).

73/ *See id.* at 202(a).

74/ *See id.* at 202(c)(1).

75/ *See id.* at 202(i). The cable/television cross-ownership rule is also under review in the *Notice*. *See Notice* at ¶¶ 43-52.

were no longer the only or even the dominant providers of information and entertainment programming.[76/]

The Court rejected an equal protection argument against the daily newspaper/broadcast cross-ownership restriction because it found that restriction no different from many other limits on broadcast ownership then in effect. Today, the other broadcast ownership limits cited by the Court have either been eliminated or loosened considerably.[77/] Because the Court's denial of equal protection claims for broadcasters and newspaper owners was premised on a regulatory regime that has changed, the Commission must, as part of this biennial review, recognize that equal protection demands the repeal of the daily newspaper/broadcast cross-ownership rule.

CONCLUSION

Congress has stated that the "Commission *shall repeal* or modify any regulation it determines to be no longer in the public interest."[78/] Under this mandate the Commission must repeal the daily newspaper/broadcast cross-ownership rule because the rule cannot remain if the spectrum scarcity rationale that supports it no longer exists. Spectrum scarcity is long since a concept of the past, and equal protection demands similar treatment for broadcasters and

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76/ Most of these deregulatory actions were part of the Telecommunications Act of 1996, a piece of legislation intended to promote competition by encouraging traditional media entities to enter each other's markets. In light of the Act's directive to the Commission to promote competition, the retention of cross-ownership rules can be seen as nothing less than a defiance of this Congressional directive.

77/ The Court specifically referred to rules that: (1) prohibited ownership or control of more than one station in the same broadcast service (AM radio, FM radio, or television) in the same community; (2) limited the total number of stations in each service a person or entity could own or control; and (3) prohibited common ownership of a VHF television station and any radio station serving the same market. *National Citizens Comm. for Broad.*, 436 U.S. at 780-781.

78/ *Notice* at ¶ 1 (citing 47 U.S.C. § 202(h)) (emphasis added).

newspaper owners with the rest of the media industry. Indeed, as these comments have shown, the daily newspaper/broadcast cross-ownership restriction is an anachronistic rule that is factually and legally unsustainable. The Joint Parties therefore join other broadcasters, jurists, distinguished commentators and current and past FCC Commissioners to urge the Commission to promptly issue a Notice of Proposed Rulemaking to eliminate the daily newspaper/broadcast cross-ownership rule.

Respectfully submitted,

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